Supreme Court, U.S.
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No. 95-382

In the Supreme Court of the United States

OCTOBER TERM, 1995

TODD SHIPYARDS CORP., ET AL.,
PETITIONERS

v.

DORIS JEAN HOKE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly held that the claimant was entitled to benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, because there was not substantial evidence to rebut the presumption that her husband's death arose out of and in the course of his employment.

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OPINIONS BELOW

The memorandum order of the court of appeals (Pet. App. 2-5) is unreported. The decisions of the Benefits Review Board (Pet. App. 6-14) and the administrative law judge (Pet. App. 15-23) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1995, and a petition for rehearing was denied on June 9, 1995 (Pet. App. 1). The petition for a writ of certiorari was filed on September 7, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Todd Shipyards Corp. (Todd) employed Truby Lee Hoke as a welder for approximately four years.[1] Pet. App. 3, 17. An hour after punching out of work on June 2, 1982, Hoke was shot and killed in Todd's parking lot while fixing a flat tire on his van. *Ibid.* Three people were arrested and indicted for the murder, but two were acquitted and the third died in custody. *Id.* at 5, 11 n.2.

2. Doris Jean Hoke, Mr. Hoke's widow, filed a claim for death benefits for herself and her two minor children under Section 9 of the LHWCA, 33 U.S.C. 909. The employer contested the claim, arguing that the fatal injury did not arise out of and in the course of the decedent's employment and was thus uncompensable. Pet. App. 17, 19.[2] At the administrative hearing, the claimant submitted the police report on the incident, which listed robbery as the probable reason for the murder, and also testified that the police had told her that her husband was murdered during a robbery. *Id.* at 5, 18. Todd's investigator testified that police investigators and prosecutors had

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[1] Petitioner Aetna Casualty & Surety Co. was named in the caption of the administrative law judge's decision as Todd's insurance carrier. Pet. App. 15. The ALJ's and Benefits Review Board's decisions, however, describe Todd, we presume mistakenly, as a self-insured employer (*id.* at 6, 16), and Aetna does not appear in the captions of the Board's or court of appeals' decisions. *Id.* at 2, 6.

[2] Todd stipulated to the fact that the "[d]ecedent suffered a harm or pain" (Pet. App. 18), and apparently did not contest that the decedent was an "employee" and that it was an "employer" subject to the LHWCA. See 33 U.S.C. 902(3) and (4).

stated that the shooting was about drugs or money. *Id.* at 5; see also *id.* at 18.

Following the hearing, a Department of Labor administrative law judge (ALJ) issued a decision and order denying benefits. Pet. App. 16-23. The ALJ recognized that Section 2(2) of the LHWCA defines a compensable "injury" as one that "aris[es] out of and in the course of employment," and "includes an injury caused by the willful act of a third person directed against an employee because of his employment." 33 U.S.C. 902(2); see also 33 U.S.C. 903 (coverage). The ALJ further recognized that the fact of "injury" had been conceded in this case and that, under 33 U.S.C. 920(a), the claimant was entitled to a statutory presumption that her husband's injury arose out of his employment with Todd. Pet. App. 19. The ALJ concluded, however, that Todd had presented substantial evidence sufficient to rebut the presumption. *Id.* at 19-20.[3]

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[3] In support of that conclusion, the ALJ first determined that because the shooting occurred one hour after the decedent punched out of work on an unguarded portion of the employer's premises, the circumstances exceeded the "reasonable margins of time and space necessary to pass to and from the place of work * * *. Decedent's activities * * * were personal." *Id.* at 20. The ALJ thus applied the "going and coming" rule to the case, concluding that the "decedent was on his way home at the time he was shot," while rejecting the claimant's contention that the lot was a "zone of special danger" that exposed the decedent to an added risk of assault. *Id.* at 21.

The "going and coming" rule generally provides that "injuries sustained by employees while going to or coming from work are not compensable." Pet. App. 20. "The three common exceptions to this rule are when the employee is paid for the trip from home to work and back, when the employer controls

The ALJ concluded that "the exact motive of the assailant or assailants in the case at hand remains unknown, at least, on the instant record," and that "it may be argued with some merit that the attack took place during the extended course of [Mr. Hoke's] employment." Pet. App. 22. Nevertheless, the ALJ "assumed," consistent with the police report, that robbery was the motive and concluded that "whatever the motive," there was "no proof whatsoever that the attack and resultant death arose out of" the decedent's employment. *Ibid.*

3. The Benefits Review Board (Board), in a per curiam decision, affirmed the ALJ's denial of benefits. Pet. App. 6-12.[4] The Board noted that the injury arguably occurred within the time boundaries of employment "because decedent was fixing a flat tire on his van, and it was reasonable for him to be in the parking lot one hour after leaving work." *Ibid.* The

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the journey, or when the employee is on a special errand for the employer." *Ibid.* The ALJ found none of those exceptions to be applicable here. In fact, neither the "going and coming" rule, nor its exceptions are applicable here since, as the Board held (Pet. App. 10), Mr. Hoke was killed at work.

The "zone of special danger" principle extends compensation coverage to employees whose "obligations or conditions" of employment placed them in a "zone of special danger" out of which the injury arose, even if their activities at the time of injury did not benefit the employer. Pet. App. 11, citing *Durrah* v. *Washington Metro. Area Transit Auth.*, 760 F.2d 322, 324 (D.C. Cir. 1985); accord, *e.g.*, *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507 (1951).

[4] The Board first held "as a matter of law" that the ALJ erred in his application of the "going and coming" rule "because the evidence is uncontradicted that the parking lot where decedent was killed is employer's lot for the use of its employees." Pet. App. 10.

Board, however, found it unnecessary to resolve the timing issue in order to determine whether the injury occurred in the course of employment, because it affirmed the ALJ's conclusion that the attack occurred "for purely personal reasons or circumstances unrelated to the employment." *Id.* at 10.[5] Thus, the Board affirmed as "rational and supported by substantial evidence" the ALJ's determination that the attack was motivated by robbery (*id.* at 11), and that the presumption that the decedent's death was work-related was therefore rebutted. *Id.* at 12.

4. The court of appeals reversed. Pet. App. 2-5. The court emphasized that "[t]o this day no one knows who killed Mr. Hoke or why." *Id.* at 5. Reciting the facts found by the ALJ and affirmed by the Board, the court noted that although the police report listed robbery as the probable motive for the crime, and Todd's investigator testified that the police and prosecutors thought that the case was about drugs or money, none of the three persons arrested for the crime had been convicted. *Ibid.* The court concluded that the employer had failed to provide substantial evidence to rebut the statutory presumption that the LHWCA covers claims brought under it, because "Todd Shipyards offered no admissible evidence that Mr. Hoke was not within the usual and ordinary scope of employment while preparing to leave the worksite." *Ibid.*[6]

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[5] The Board agreed with the ALJ that the attack did not take place within a "zone of special danger." Pet. App. 11.

[6] In a subsequent order granting the Director's motion for clarification (and also denying rehearing and awarding approximately $6,800 in attorneys fees), the court ordered the case remanded to the ALJ for purposes of awarding compensation. Pet. App. 1.

ARGUMENT

In reversing the denial of LHWCA benefits in this case, the court of appeals reached the unexceptional conclusion that the statutory presumption of coverage is not rebutted where the record lacks evidence with respect to who killed an employee who was still on the employer's premises or why the employee was killed. Although the decision seems to tie the substantiality of evidence to unspecified rules on the admissibility of hearsay evidence, see note 8, *infra*, and fails to remand on the issue (left open by the Board) whether the death occurred within the time bounds of employment,[7] see note 12, *infra*, the decision below does not conflict with any decision of this Court or of any other court of appeals. Moreover, because the memorandum opinion is unpublished, it is without precedential value. Review by this Court is therefore unwarranted.

1. Petitioners argue (Pet. 12) that the decision of the court of appeals is in error because the court "replaced its findings for those of the trial court." That argument mischaracterizes what the court did. Its reversal of the Board's denial of benefits turned on the finding that "no one knows who killed Mr. Hoke *or why*." Pet. App. 5 (emphasis added). That finding originated in the ALJ's opinion. See *id.* at 17-18, 22 ("the exact motive of the assailant or assailants in the case at hand remains unknown, at least, on the instant record"); see also *id.* at 11 n.2 (although "[t]hree

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[7] In the court of appeals, the Director, Office of Workers' Compensation Programs, urged a remand in order for the ALJ to resolve the question whether the decedent's injury was within the time bounds of his employment and to reweigh all evidence of job-relatedness, including the time factor.

persons were indicted for decedent's murder[,] * * * [t]wo of the defendants were found not guilty and the third died in custody"). Given that finding, the court of appeals simply determined that the Board's affirmance (*id.* at 11) of the ALJ's conclusion that petitioners "ha[d] presented substantial evidence sufficient to rebut the § 20(a) presumption" (*id.* at 20) is insupportable as a matter of law. The holding below thus does not constitute a reweighing of the evidence or new factfinding. Rather, the court recognized that the administrative record lacked evidence to overcome the statutory presumption that Mrs. Hoke's "claim comes within the provisions of [the LHWCA]" (33 U.S.C. 920(a))—*i.e.*, evidence that the death did not arise "out of and in the course of employment" (33 U.S.C. 902(2)).

Petitioners nevertheless assert (Pet. 12) that "[s]ubstantial evidence * * * exists in the record to support the conclusion that the motive for Mr. Hoke's murder was robbery." Similarly, the ALJ (Pet. App. 22) "*assumed* * * * the motive was robbery," based on the police report, and the Board affirmed that determination. *Id.* at 11 (emphasis added).[8] The court

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[8] Neither the ALJ nor the Board explicitly relied on the private investigator's testimony that the police and prosecutors believed "the shooting was about drugs or money." Pet. App. 5; see *id.* at 18. Although that testimony was not inadmissible because of technical rules of hearsay, the ALJ was free to disregard it as unreliable. Cf. 33 U.S.C. 923(a) (ALJs are not bound by "technical or formal rules of procedure," but are to conduct hearings "in such manner as to best ascertain the rights of the parties"); 20 C.F.R. 702.339 (same); *Brown Badgett, Inc.* v. *Jennings*, 842 F.2d 899, 902 (6th Cir. 1988) (ALJs must conduct hearings and consider evidence "so as to promote fundamental fairness"). Thus, the court of appeals' suggestion (Pet. App. 5) that the private investigator's testi-

of appeals, however, correctly rejected that speculation as insufficient for purposes of rebutting the presumption that Mr. Hoke's death was work-related. *Id.* at 5. As the court stated, "[t]he police report lists 'robbery' as the probable motive" for the shooting, without providing further analysis. *Ibid.*[9] Rather than establishing that the decedent was shot during a robbery, the report, at best, simply "offer[s] a field for such a speculation." *Marra Bros.* v. *Cardillo*, 154 F.2d 357, 358 (3d Cir. 1946).

Moreover, the report does not help to resolve the question whether the attack was purely personal in nature and therefore not compensable.[10] Thus, even if

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mony was "hearsay" and not "admissible" is no more than harmless error.

[9] The police report, which was written shortly after the shooting and thus constitutes only a preliminary police finding, lists "gunshot wound" as the "probable cause of death," and in the next box lists "robbery" as the "reason." R.E. 37. The only other relevant information in the report is in response to an instruction stating "(1) RECONSTRUCT THE CIRCUMSTANCES SURROUNDING THE DEATH (2) DESCRIBE PHYSICAL EVIDENCE, LOCATION FOUND AND GIVE DISPOSITION." In that box, the report, in relevant part, states:

> The Decedent was at his veh when he was shot and robbed. Dets obs decedent to be laying in a supine position near his veh. His wallet was recovered nearby.
>
> Decedent had been shot numerous times.

Ibid.

[10] In affirming an award of LHWCA benefits to a worker who, shortly after being laid off, was found dead on the ship where he had worked, the Third Circuit in *Marra Bros.*, 154 F.2d at 359, held that even if the worker had been murdered, "it would still be necessary for the plaintiffs to prove by substantial evidence that his death did not arise out of or in the

the police report did constitute substantial evidence that the motive for the murder was robbery, it would not establish that the robbery was targeted at the claimant for reasons stemming from his private life, and so would not detract from the pivotal finding that neither the identity of the assailants nor their motives were established by substantial evidence in the administrative record upon which the benefits decision must be based.

2. Petitioners also argue (Pet. 14), contrary to the uniform opinion of the ALJ, Board, and court of appeals, that the claimant never was entitled to the Section 20(a) presumption of compensability because she "failed to submit any proof that the fatal assault was directed against Mr. Hoke because of his employment." *Ibid.* (emphasis omitted). No case law, however, supports the notion that a claimant bears an

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course of his employment." Similarly, the District of Columbia Circuit awarded benefits under the LHWCA to an employee stabbed by an unknown assailant. *Hartford Accident & Indem. Co.* v. *Hoage*, 85 F.2d 417, 418 (1936) ("[T]he claimant's injury arose out of his employment, because the terms and conditions of his employment placed the claimant in the position wherein he was assaulted by the assailant and sustained the injuries from which he suffered."); see also *Hartford Accident & Indem. Co.* v. *Cardillo*, 112 F.2d 11, 14 (D.C. Cir.) (LHWCA benefits awarded to employee assaulted by co-worker because "no more is necessary than that the work subject the employee to a peril which comes from the fact that he is required to be in the place where it strikes when it does so"), cert. denied, 310 U.S. 649 (1940); 1 A. Larson, *Workmen's Compensation Law* § 11.21(a), at 3-274, § 11.11(b), at 3-196 to 3-197 § 11.32(b), at 3-320 (1995 & Supp. 1995) (citing assault cases in which benefits were awarded under both the LHWCA and state schemes where the animosity or dispute culminating in the workplace assault was not "imported into the employment from claimant's domestic or private life").

"initial burden" of proving work-relatedness in order to benefit from the Section 20(a) presumption of work-relatedness, see *id.* at 13 & n.18, even where the injury stems from "the willful act of a third person." 33 U.S.C. 902(2).[11]

In *U.S. Industries/Federal Sheet Metal, Inc.* v. *Director, OWCP*, 455 U.S. 608, 612-613 & n.5 (1982), this Court held, not that a claimant must submit proof that an injury is work-related, but rather that "[a] prima facie 'claim for compensation,' to which the statutory presumption refers, must at least *allege* an injury that arose in the course of employment as well as out of employment." *Id.* at 615 (emphasis added). Likewise, in *Marra Bros.*, the Third Circuit explicitly recognized that by virtue of the Section 20(a) presumption, the employer seeking to avoid the claim in that case bore the burden of proving that the employee's "death did not arise out of or in the course of his employment," even if the employee "came to his death by foul play." 154 F.2d at 359. Because petitioners do not contend that the claimant in this case failed to "allege" a work-related injury, there is no merit to the suggestion (Pet. 14) that the court below committed legal error warranting review by this Court when it upheld the ALJ's and the Board's

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[11] Indeed, rather than placing an additional requirement on the claimant, the last clause in Section 2(2) of the LHWCA, 33 U.S.C. 902(2), merely allows the claimant to recover if he is injured by an assault directed at him because of his employment, regardless of whether the injury otherwise arose in the course of his employment. See *Maryland Casualty Co.* v. *Cardillo*, 107 F.2d 959, 961 (D.C. Cir. 1939).

rulings that the claimant presented a prima facie case of entitlement.[12]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[12] As indicated above (see p. 6 & note 7, *supra*), it arguably was improper for the court of appeals to order that benefits be awarded rather than to remand for further proceedings. The Board had reserved judgment on whether the ALJ had erred in concluding that the attack on the decedent took place outside the reasonable time bounds of his employment, see Pet. App. 10, 20, and the court of appeals directly addressed only the factor of causation in reversing the Board's decision. Petitioners, however, do not raise that issue as one upon which they seek certiorari, see Pet. i (Questions Presented for Review), and, perhaps because the decision below is unpublished and therefore has no precedential value, see 9th Cir. R. 36-3, do not point to any significant impact that is likely to arise from it. Moreover, even if petitioners had argued the point, it would not present "special and important reasons" for "an exercise of this Court's power of supervision" under Rule 10.1(a) of the Rules of this Court.